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In the Supreme Court of the United States.

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ROBERT E. DOWNS, PETITIONER,
v.
THE UNITED STATES. } No. 318.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

This case raises the single question whether a bounty or grant was bestowed by the laws of Russia on the exportation of the sugar involved. The point of jurisdiction which might be urged in favor of exclusive executive authority to determine the question appears to have been definitely waived by Secretary Gage's voluntary submission to the judicial determination of the Board of General Appraisers and the courts. Besides, this court reserves authority to review an administrative determination explicitly made final where the same has proceeded upon a wrong principle contrary to law; and the present question may be said to be one of law, since it does not so much refer to the existence of a foreign law as a fact, as to its interpretation and bearing upon our own laws, so that if

a final executive determination had been made in the present case, it might at least have been challenged in this court (whether successfully or not), upon assumption of jurisdiction below despite executive ruling, and grant of *certiorari* here.

The act under which the question arises provides:

> That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties. (Sec. 5, act of July 24, 1897.)

The only other case arising under this law is that of *Hills* v. *United States* (99 Fed. Rep., 425), in which the circuit court determined respecting a Dutch arrangement that the bounty was upon production and not upon exportation of the sugar, directly or indirectly. But since the Dutch law allowed a remission of the excise tax on exportation and provided for the payment to manufacturer or refiner of the credit difference between his excise and bounty account, the appellate court (107 Fed. Rep., 107) held that the excise tax "being thus eliminated from the debit side of the account, the manufacturer or refiner receives from the Government the excess of credit over debit, which is the precise amount of the bounty. * * * The other provisions of the law have the practical effect of making it, from the standpoint of the other countries, a bounty on exportation." The practical effect of the Dutch law is that "those who export their sugar may keep this bounty; those who do not export it must forthwith return it to the government." In other words, this case shows typically the operation on exports of bounties on production, for Dutch manufacturers have this premium advantage, when they export wholly or largely, that, receiving the production bounty in any case, their excise taxes, although at a higher rate per unit than the bounty, are wholly or mostly remitted, and the net result is a grant on the exportation.

ARGUMENT.

The Russian sugar law and regulations and various explanations of their working and effect are given in

the record—the law and governmental instructions or regulations thereon at pages 40–58; the facts about production, taxes, prices, etc., with explanatory statements and illustrations in the stipulation (p. 8), in the report of the American consul (pp. 12–23), and in the opinion of the board of general appraisers (p. 24, *et seq.*) A foreign view of the Russian arrangement, holding it to constitute a bounty on exportation, is given by the delegate of Austria-Hungary at the Brussels Conference of 1898 (pp. 57–61 of Senate Document, inserted at Rec., p. 69). The view of Russia, that no bounty is paid on exported sugar, is given by its delegate at that conference (pp. 46–50 of Senate Document), and again in reply to the Austrian presentation (pp. 70–73). The dissenting opinion of General Appraiser Tichenor takes the Russian view that an export bounty is not bestowed (Rec., pp. 34–40).

Attempting, however, an independent summary of the law and regulations (pp. 40–58), it appears that the Russian Government determines the total quantity of domestic sugar needed for home consumption, fixes the maximum price, and thereupon controls production and prices by—

(*a*) Allowing to each factory a certain normal and fixed amount of production (pp. 40–41, par. 3); and

(*b*) Such additional amount as under the proportion indicated in (*c*) will bring the total production of all factories up to the limit of quantity fixed for home consumption (p. 41, pars. 2, 3, 4). These two items

constitute "free sugar," salable in the home market on payment of the normal excise tax.

(*c*) By providing that the excess of production over the amount fixed for home consumption, which excess is proportioned or distributed among the factories in the ratio of their respective production over the normal and fixed amount allowed to each, shall be divided into a moderate percentage of "obligatory" or "indivertible" reserve and a balance of "free reserve" (pp. 41–42, pars. 2, 4, 5, 6).

Sugar from neither of these reserves may be put on the home market except on payment of the double excise tax, which is practically prohibitive.

(*d*) By permitting the "obligatory reserve" sugar to be sold at home, or the "free reserve" sugar (if necessary), on a rise of prices beyond the maximum fixed, upon payment of the normal excise only (p. 41, par. 7).

(*e*) By exempting sugar exported from all excise taxes (p. 41, par. 9).

(See also secs. 12, 13, 14 of "Instructions," pp. 48–49; last paragraph of sec. 18, and sec. 20, with note 1, pp. 50–51; secs. 32, 33, p. 54.)

Through this last provision, (*e*) skillfully applied to sugar which preceding paragraphs profess to lock up in the factories until the double excise is paid, Russia manifestly encourages exportation. For no manufacturer would export free sugar out of a most profitable market, and plainly the function and use of the free reserve is exportation, to foster which trade is ordinarily a legitimate national purpose. But is there not a

premium? In this scheme, asserted to relate only to production and home consumption, would not free sugar and obligatory reserve have enabled the Government to control fully domestic use and price?

Was there not some purpose, in the antagonistic purposes of stimulating production and controlling it, to achieve the first purpose, not by frank encouragement of exportation free from tax, but by the veiled method of a reserve production, ostensibly held against domestic needs and price disturbances, but really a supply for exportation, which is benefited by a premium?

The Russian Government desires to maintain prices and therefore limits the output on the domestic market. But that Government also desires to stimulate production, and for this purpose puts a premium on exportation. It is neither necessary nor proper to suggest a covert purpose to bestow a bounty seeking a covert method; but the Russian attitude, as will be shown below, offers some excuse for such a suggestion. It is enough to establish that the premium on exportation, the indirect bounty, is the necessary effect and result of the scheme.

Further pursuing the Russian law, the grant as a governmental allowance is shown by the complete control of the Government over it. It is not something launched and permitted to take its course, which might relieve the Government of any charge or responsibility for casual or indirect results—of the charge, at least, of intention to bring about a consequence not clearly

visible at the start—but the Government reserves the power to suspend the remission of excise in order to guard against the effect of such a rise of prices in the rest of Europe as might cause an abnormal domestic overproduction (p. 42, note at top of page). In other words, the deliberate export use of the device is emphasized by this very check upon it.

How does the bounty or premium appear? In the first place, free sugar is never really exported because of its valuable privilege of sale in the Russian market, as against the absence of direct profit, or even actual loss (which is more than offset, however, indirectly) in case of export sales. Moreover, if free sugar should be sold for export, the same fact appears in effect (that free sugar is never really exported), because "the excise office debits the exported quantity of sugar to the free surplus of the mill, if such there be, and increases by a like quantity the allowance of free sugar" (p. 55, note to sec. 37). How the Government returns, or rather remits, the regular and additional tax (which have been secured only, not paid), after exportation has been duly established under official supervision, is shown in section 38, paragraphs 1–5 (pp. 55–57).

There is one more highly significant feature in the arrangement—the cession or transfer of free sugar from one mill to another in order to facilitate the exportation of the surplus (free reserve) to foreign countries (p. 57, II, secs. 39 *et seq.*). The obvious working is as follows: A manufacturer at or near one of the ports of

export, who is thus free or substantially so from the cost of inland transportation to tidewater, but subject to heavy rates for inland hauls—who can, therefore, export more profitably than a manufacturer in the interior (access to the domestic market being practically essential to the latter)—assigns to the inland producer a certain quantity of free sugar, and suffers a corresponding transfer from his own free-sugar account to surplus or free reserve.

This assignment or transfer carries a consideration to the producer who cedes his home market right, and constitutes the concrete evidence of the premium or indirect bounty on exportation. An illustration of such a transaction, giving the value of a transfer, is shown in Consul Heenan's report (p. 17, and again at pp. 62–63). It should be noted that this report states that—

> The Russian Government, in order to regulate the sugar trade and to give the industry a solid basis, prescribes that a certain quantity of the surplus of all sugar mills or factories must be exported; whether this sugar is exported direct from each factory, or if one factory exports its whole production, is immaterial to the Government.

THE BRUSSELS SUGAR CONFERENCE OF 1898.

It will be helpful to epitomize as part of the argument the transactions of the Brussels Sugar Conference of 1898. These appear separately in a Senate Document, beginning at page 69 of the record.

I premise this abstract by respectfully submitting

that we are not concerned with this foreign law merely as an existent fact appearing from authentic books or reports, or from opinions of doctors, showing that the law clearly means so and so. We are, of course, dealing with it as a matter of law, with its legal meaning and effect, to be weighed and construed judicially by this tribunal in order to apply it correctly to the solution of our own law. Nevertheless, in this subject, technical and economic as well as legal, the views of distinguished foreign experts on the industry involved, and on the foreign export bounty arrangements which are current, are entitled to very great weight.

In the British report (pp. 6–10, Sen. Doc.) it appears that there was general agreement that export bounties ought to be abolished, except on the part of France and Russia. France indicated her willingness to suppress the direct bounty under one of her laws, reserving the indirect bounty under another. Russia states her understanding that her internal law is not to be discussed. The Austro-Hungarian statement (see in more detail *infra*) is noted, viz, that the real effect of the Russian system is a bounty on exportation, and the report reiterates the Russian unwillingness to discuss her internal legislation and her claim that her system does not amount to a bounty on exportation. "Russia declines even to discuss whether her system amounts to a bounty or not."

The address of the president of the conference (p. 14, Senate Document) mentions the economic evils of bounties, and the grievous condition caused by their

disturbance of outside markets. The Russian delegate (p. 15) makes a cautious reservation as to the scope of the discussion. The question of "refining yield and surtaxes"[a] (import duties) is regarded as important (p. 19), as without agreement thereon "the indirect bounty which is granted to the production of raw sugar and which all have interest in doing away with would not be long in reappearing in some other form."

The Russian delegate interposes another reservation at this point (p. 20) on the ground that Russian customs duties are outside of the jurisdiction of the conference. In the President's view, if other delegates formulated reservations as absolute the labors of the conference would be singularly reduced. The Russian delegate (p. 21) explains his reservation and says that Russia pays no export bounties, but "bears the counter effect." The Russian delegate (p. 26) expresses his cordial concurrence in the justice and equity of the French view, that no change should be permitted to disturb existing contracts in which consuming as well as producing countries are interested. France frankly admitted her indirect bounties (pp. 27–32) and offered to sacrifice her direct bounties.

The British delegate (p. 36) thinks the conference should determine whether the bounties granted to production are really applied for the purpose of export bounties. The delegate of Austria-Hungary (p. 37) is convinced that it is feasible to apply export bounties

[a] It will be observed that on page 74, Senate Document, "surtax" is more precisely defined as the "difference between the rate of import duty on foreign sugar and that of excise tax on domestic sugar."

to the sugar industry in different ways; that such is the practice, and that the particular form of such advantages plays a very secondary part. The delegate of Germany pointed to the same view (p. 38), viz:

> There remains open the question of knowing whether there are still other means of fostering by means of legislation, as, for example, in Russia, the exportation of sugar and working the same effect as by export bounties.

The Russian delegate reserves the right (p. 40) to reply to the German and Austrian statements. The Russian delegate states (pp. 46–50) the Russian position that Russia does not pay bounty to exported sugar and only returns the collected tax. "Thus our sugar can not profit by a disguised bounty—a point which besides has been acknowledged by the sugar conference held at London in 1888" (p. 48). He shows concern at a discussion of customs duties and differentials which might interfere with sovereign rights "under the pretense that [the particular] tariff is too high and favors exportation" (p. 50).

On page 51 appears the proposal submitted to the conference for the definition of export bounties which should be abolished. It will be noted that this definition was restated on page 61 and accepted unqualifiedly by all the delegations at the conference except France and Russia, who accepted it under their previous reservations. The definition is as follows:

> The conference, while reserving the question of mitigations and provisional disposition that

may be authorized, if need be, by reason of exceptional situations, is of opinion that bounties whose abolition is desirable are understood to be all the advantages conceded to manufacturers and refiners by the fiscal legislation of the States, and that directly or indirectly are borne by the public treasury.

There should be classified as such, notably—

(*a*) The direct advantages granted in case of exportation;

(*b*) The direct advantages granted to production;

(*c*) *The total or partial exemptions from taxation granted to a portion of the manufactured products;*

(*d*) *The indirect advantages growing out of a surplus or allowance in manufacturing effected beyond the legal estimates;*

(*e*) The profit that may be derived from an excessive drawback.

In addition the conference is of opinion that advantages similar to those resulting from the bounties hereinbefore defined may be derived from the disproportion between the rate of customs duties and that of consumption dues (surtaxes), especially when the public powers impose, incite, or encourage combinations among sugar producers.

One of the French delegates (p. 52) points out the premium possible, where there is government ownership of railroads (referring immediately to Germany), by special freight rates for the transportation of sugar for exportation, by revision of rates on sugar beets, fertilizers, etc.

A Russian delegate (p. 55 and note) claims that, under their system of excise control and uniform tax, there is no chance of an export bounty by reason of legal presumptions as to "net yield" and "waste" in refining.

The first Russian delegate (p. 56) returns to the question of sovereignty involved in the conference assuming to revise customs duties, and reiterates that Russia pays no premium, direct or indirect.

Beginning at page 57, the delegate of Austria-Hungary makes a statement from which I quote:

> The first delegate of Russia read a statement which may be summarized as follows: Russia does not grant any export bounty to its sugar industry. She does not intend to make any change whatsoever in her sugar legislation, even though other States that are now paying bounties should eventually be disposed to abolish them.
>
> The Russian system concerning sugar is indisputably that which deserves the greatest attention among legislations in Europe bearing upon the same subject. It is an extremely ingenious device, and the Russian Empire is indebted to it for the notable increase in the output of sugar which has taken place since it came into operation; all this with the appearance that no premium, in the narrow meaning of the word, has been applied.

(Then follows an analysis of the facts and figures showing the stimulation of production for export, which appears to me to confirm fully the statement of the scheme which I have attempted to formulate above.)

This situation gives to the manufacturer a certainty that he may demand of the consumer a price obtained in fact, a price, shall we say, which not only exceeds that on the market of the world by the whole amount of the simple tax, but which reaches in addition almost the second payment of the tax * * * Thus an actual advantage * * * is gained in consequence. The difference * * * is explained by the difference in cost of transportation and other commercial conveniences * * * The Russian commerce computes this difference with absolute certainty, and the result is that certificates of export simply constitute a quittance of the State for certain quantity of sugar sold abroad. Now these certificates are quoted on "change" at rates which vary between the above indicated limits, [and] * * * are utilized by merchants and manufacturers to facilitate the exchange of sugar among factories which by their location and interests find exportation easier [than] those which confine themselves to produce for home consumption. * * * This measure carries exactly the same effect as the export bounty given by the other States.

There is a difference in the form of protection between the systems of countries that grant bounties and that which governs the same matter in Russia. While the former issues certificates payable in coin, the latter only delivers certificates of export which are quoted on 'change.

But the essential difference in the favors accorded by Russia to the sugar industry is

> characteristic in that the disguised bounty is much higher than that known in other countries. * * *
>
> These enormous figures afford a sufficient explanation of the motive which impels Russian manufacturers to increase their output. They also explain how Russia is in a position to export, notwithstanding low rates [prices], to the markets of the world, and why she is the only State where in recent years new factories have been erected and more still contemplated. * * *
>
> The honorable first delegate of Russia himself gives us, besides, with great accuracy, the character of the tendency of Russian legislation in regard to sugar, when he says it is a question of alleviating the losses sustained by the manufacturers when they sell abroad. We believe, indeed, that such has been the tendency of Russian law, and that the result achieved has been as complete as could be wished for.

Again (p. 61) the Russian delegate formally reserves discussion upon the internal régime of Russia, stating that Russia has no intention of modifying its sugar legislation. And again (p. 69) the Russian delegate says certain formulas submitted on the subject would be more likely to receive favorable consideration through diplomatic negotiations, and once more states that he can not allow the internal home legislation of his country to be discussed by the conference; although, afterwards, he says that he does not mean to preclude an examination of the Russian system by the conference, but must refrain from taking any part in the debate.

On p. 70 *et seq.*, the Russian delegate defends Russia's position, but, it seems to us, without successful reply to the Austro-Hungarian statement; basing his argument practically upon the fact that, while production had been much stimulated, there was not much surplus, as the consumption tended to keep pace with production. He states in this form the Russian view:

> Russia's legislation, therefore, goes even further than the very resolutions of the conference, for not only does it not grant export bounties, but, on the contrary, it imposes penalty on the sugars that are produced in excess of the home-market demands.

From page 74 to page 77 there is a very interesting colloquy, especially on the part of the delegate of the Netherlands and the president of the conference, to which the Russian delegate makes a diplomatic acknowledgment, intimating in a new form Russia's unwillingness to accede to the views expressed. The "very lucid statement" of the Netherlands delegate justifies free quotation:

> The Russian system puts a limit, by virtue of governmental action, to the production for home consumption; that is to say, to the supply for the home markets. Now, if one wishes to limit the supply, it is natural that the barrier should be raised to stop the influx of foreign sugars; the surtax is therefore a necessary adjunct to the limitation of home consumption; but from that limitation arise the dangers for producers in other countries.
>
> The supply for the home market being limited, the selling price on that market is very

remunerative; each producer has therefore an interest in placing as much sugar as he can on the home market, and as the total amount to be so placed on that market is distributed among all the manufacturers in proportion to their respective output, they are incited to enhance the amount of that output. Now, such sugar as they can not sell at home must be exported; they are thus led to selling abroad, even at less than cost price, and their only object is to compensate losses sustained abroad by profits made on the home market.

For an important portion of the Russian output exportation has, as a matter of fact, become the condition which the manufacturer must meet in order to sell at home. That is the characteristic feature of the Russian system, that by which it is distinguished from all others. * * *

Is that an export bounty? Not within the technical meaning of the word; but it is an inducement, a special financial interest, which operates like a bounty. * * * Can not the conclusion be deducted that in artificial economical systems there are things that are seen and others that are not seen; things that are foreseen by the side of others that are not foreseen? The honorable delegate does not think it incumbent upon him to deal with the intention which presided over the establishment of the system, but with the effect which that system has had.

The president of the conference believes that as regards Russia the very lucid statement of

the honorable the delegate of the Netherlands seems to be in accordance with the facts, and that the passage of the definition of bounty which relates to surtaxes can be applied to the system established by Russian legislation. The passage, indeed, reads:

> Advantages similar to those resulting from bounties can be derived from the disproportion between the rates of customs duties and that of consumption duties (surtaxes), especially in places where public authorities enforce, suggest, or encourage combinations among sugar producers.
>
> It is obvious that Russian legislation incites such combinations by limiting the supply for home consumption. * * *

The president quotes from a journal of the Belgian sugar trade:

> As you see, Russian sugar legislation is very ingenious, and, I may even say, paternal. Not only does it guarantee to sugar manufacturers a very high indirect premium, but it protects them besides against the baleful consequences that an exaggeration of sugar quotations might have for themselves. For it is obvious that if the Government did not limit the maximum price of sugar, the exaggeration of the latter might bring about a decrease in consumption, and consequently the collapse of the bounty system itself.
>
> The only weak point of the Russian system is that it does not raise an insuperable barrier to the extension of production, and consequently

> to compulsory exportation; but the Government did not see fit to place the manufacturers under too absolute a tutelage. * * *

The president (p. 77) observes that his object in laying some stress on the situation which has just been defined, is solely to bring out with greater force the necessity of an agreement with Russia if it is desired to effect an international understanding.

The Austro-Hungarian delegate speaks of the "cartel" among their producers, which has been commented upon in the Russian delegate's defense, saying that the cartel in Austria-Hungary is a private institution, not concerned with exportation, but with the common interests of the producers in the interior. This cartel, after all, corresponds to that which existed in Russia before the intervention of the State. The Russian cartel had to resort to Government aid in order to put an end to the difficulties which it had made for itself (pp. 75, 76).

Finally, it is to be noted regarding this conference that Russia admits that, under the present system, the factories find themselves compelled to export:

* * * * *

> 6. Russia would decree that the quantity of sugar that the factories be allowed to supply for home consumption, under payment of the simple tax, shall henceforth be allotted in advance; for instance, according to a scale based upon the production of the preceding years, *so that factories would not longer find themselves compelled to export.* (Clause 6 of annex to procès-verbal, p. 80.)

THE BRUSSELS SUGAR CONFERENCE OF 1902.

The advance sheets of Consular Reports issued by the State Department (No. 1328, April 29, 1902) contain a letter from the United States consul at Odessa—the same consul whose report is contained in this record. In that letter it is stated that the recent Brussels Sugar Conference, meaning the conference of 1902, at which Germany, Austria-Hungary, France, Belgium, Holland, and other countries were represented, an agreement was reached, by which, if properly indorsed by the countries represented, all bounties on sugar would be abolished in 1903.

> Russia was not represented at the conference, but the action of that body was closely watched here [in Russia] and the results are even now agitating official circles. * * * The action of the conference must naturally have an effect on the sugar industry of Russia, though the official organ of the Government declares that "Russia will not enter into any kind of agreement which in any way attacks her tariff policy and the organization of her industry." Instead of such an agreement, *a series of internal measures are recommended which, it is hoped, will render the sugar industry of Russia independent of the world's market.*

It seems to us that sufficient has been adduced in the opinions of foreign experts of the highest standing as to the Russian arrangement, and in the evidence of the resistant and even secretive attitude of Russia, to justify the suggestion (*supra*) that whatever was the original intention underlying Russia's scheme, its

effect is perforce recognized and sought to be avoided by the Russian advocates. Throughout the Brussels conference the Russian delegate, either by brevity and silence or else by counter assertion, manifestly protested too much.

The Russian newspapers have commented on the situation, and our consuls in Russia have transmitted from time to time copies of articles from various journals. For instance, the Finance Recorder, of St. Petersburg, published an article which was republished in the official gazette of the Prefect at Odessa, stating that sugar exported from Russia received no kind of premium, either overt or covert; that "if one may speak at all of covert export premiums to the detriment of local consumers, this can not relate to the Russian limitation of sugar, but to the trusts and syndicates which more and more seize upon various productions, and which consider exportation solely as the means of keeping up high prices in the internal market;" that it was in "West European countries where the idea of the existence of a covert Russian premium first originated which called forth the unjust American measure." (Inclosed in dispatch from United States consulate at Odessa, Russia, dated March 4, 1901.) On this article the comment may be ventured that it only shows that the Russian scheme lends itself to combinations which work out a premium.

We submit, for what it may be worth, the following extracts from an article in the Boston Herald of August 16, 1902, contained in a cable dispatch purporting to

come from St. Petersburg as correspondence of the Associated Press:

> It has long been an open secret that the sugar legislation and policy of M. Witte, the finance minister, find no more support in Russia, outside the ranks of the sugar producers, than they do abroad. This revolt appears now to have extended even to Kieff, the center of the Russian sugar business. The newspaper, the Kievlanin, treats M. Witte's last diplomatic essays with just as marked coldness as did the foreign press.
>
> * * * Moreover, it supports the position taken by the United States, that a general law directed against all bounty-fed sugar can not be regarded as an infringement of the most-favored-nation principle.
>
> The paper sees no sense in embroilments, such as M. Witte brought about between the United States and Russia, for the sake of what he calls "a clique of favored manufacturers." It characterizes M. Witte's denial of a bounty on sugar as not corresponding to the facts of the case.
>
> "The Brussels conference," says the Kievlanin, "opened the door to the healthy competition of Russia in the world's sugar market, and Russia proceeds to slam this door in the interests of an artificial system." * * *

SOME GENERAL PRINCIPLES AS TO ALLOWANCES AND BOUNTIES.

The presentation of this case in the opinion of the Board of General Appraisers is, we submit, careful and conclusive. The board discuss the language of the

statute, review the authorities on the meaning of the term "bounty" and the extended import of the related term "grant," emphasizing the intention of Congress as liberal in its inclusions because of the phrase "directly *or indirectly*." The board analyze clearly and logically the Russian arrangement, and conclude that on the reasonable interpretation which all statutes should receive, it amounts unquestionably to an indirect bounty.

The dissenting opinion of the board, in suggesting that this country would not assent to foreign characterization of its drawback allowances and remission of internal taxes upon exportation as bounties, direct or indirect, by no means presents a controlling consideration. In the first place, it is manifest that such allowances are the mere remission of taxes, and have no indirect or concealed effects as part of an intricate scheme of Government control over production, market prices, etc. Drawback is the technical term for the refund of import duties on raw materials imported when completed articles, manufactured here from such materials, in whole or in part, go out as exports. They thus in part encourage domestic manufactures, and in part, like the remission of internal taxes, encourage the export trade. But these are not objects which as our system is devised and applied are intended to affect foreign markets (except as the enlargement of perfectly legitimate competition affects them), nor do they have that result. Furthermore, if a foreign government should object to our drawbacks or remission

of internal taxes as unduly encouraging our export trade to that government's detriment, in its own markets, and as amounting in practical effect to an indirect bounty, we might successfully urge our diplomatic resistance to that view, but I can not see that we should have conclusive *legal* ground for resisting simply because it was an ordinary tax remission or drawback in our own municipal system. *Quoad* the foreign governments and markets, it might possibly act as an indirect bounty, justifying countervailing duties; and if it so acted, I do not well see how we could make our protest effective on strictly legal grounds connected with the terminology or the precise nature of our home device.

It is significant, as bearing on this point, that in the circular of the Treasury Department (T. D., 20407) announcing the existence and amounts of certain foreign export bounties, the Argentine Republic is found to allow a certain bounty on sugars produced in that country since January 20, 1897, *and exported with benefit of drawback.*

In reference to the various allowances for the benefit of the codfisheries, as by the acts of 1792 and 1797 (1 Stat., 229; *id.* 533), the course of debate (Annals of Congress, 1792, pp. 362–401; *id.*, 1797, p. 446) shows that while the word "allowance" was used instead of the objectionable word "bounty," the benefit was plainly regarded by many public men as equivalent to or in lieu of the drawback of duties previously paid on imported salt used in preserving fish, and as equiva-

lent to a bounty. The party insistence throughout these debates in itself is evidence that "drawback," "bounty," and "allowance" were considered as convertible terms in general meaning and effect. It is true that no case decided by this court seems to sustain the view, as a strict legal view, that protective tariff duties and ordinary exemptions from taxation are to be classed as indirect bounties; but that view of them, which has often been taken in public discussion and scientific treatises, is not without force and reason. For it seems that any special favor, benefit, advantage, or inducement conferred by the Government, even if it is given as a release from burden and is not a direct charge upon the Treasury, is fairly included in the idea and meaning of an indirect bounty.

THE COUNTER ARGUMENT.

The Russian Government does not *penalize* overproduction (as stated on page 9 of the importer's brief), but invites it and regulates it and thrusts it into export, as I have endeavored to show. For neither the normal nor the additional excise is required to be paid, as the brief in that passage clearly implies, but the product is held in the factories, as export warehouses in substance, and free of all tax while thus kept out of the domestic market; and the remission on export is a bookkeeping cancellation of liability, but none the less an inducement to and premium on exportation.

Analyzing the alternatives of the producer as to "surplus sugar," "free reserve" (imp brief, p. 10), he

would manifestly not sell at home under the double excise charge; he would not store the product in his mill as an idle asset; he would not transfer to the next campaign's account (a fallacy reiterated by counsel), because clearly this would cut down that campaign's production just so much (this is evident from careful analysis of regulation 19, rec., p. 50); he *must* export. As I have pointed out *ante*, the Russian contribution to the *procès-verbal* of the Brussels Conference of 1898 admits the compulsory character of their sugar exportations. Nothing could better show the intricate and covert character of the Russian device than this illusory list of alternatives.

On page 14 of his brief counsel italicizes the statement that the transfer of the right of issue into the domestic market—admitted to be an ordinary transaction, and to receive a consideration—does not involve, as an expressed condition, the export of sugar. (See also pp. 23, 31, 38, 39.) But the man who transfers free sugar has only reserve sugar in exchange; and I submit that it is conclusively shown he *must* export and *does* export—manifestly *always* exports. The Russian scheme is irresistibly aided as to this (and is probably meant to be) by the local situation regarding the domestic markets, freight rates, shipping ports, etc.

It may be that there was some confusion in the tribunals below (opposing brief, pp. 15–23) as to the government certificate or voucher showing export merely and serving as the foundation of the remission of tax, and the certificate of transfer between mills from

reserve to free sugar. Both carry a benefit—the first freedom from tax liability, the second a domestic market right salable on 'change. Together they equal in value the highly protected, doubly and trebly protected, Government sugar price, as counsel shows (brief, p. 22). Whatever technical defects in characterization of these documents or rights the board and the lower court may reveal to counsel's very exact criticism, the salient facts remain as they state them. In these passages counsel again says: "The transfer does not involve the export of any sugar at all." We respectfully submit that every such transfer necessarily involves export.

As to the "voucher" for the remission of the *normal* tax on the export of free sugar, and as to the necessity for return to Government examination of the export certificate for remission of liability to *additional* tax on "surplus" sugar (brief, p. 17), no confusion can be imported into the question on this score. The point is immaterial and without bearing. All the taxes are ultimately remitted, from whatever account export is made and by whatever successive steps remission is accomplished. As I have said, free sugar is never really exported: if a mill wishes to ship abroad quickly, it doubtless serves expedition to have to deal only with remission of the normal excise, and so "free sugar" goes; but the same manufacturer may immediately replace the free-sugar depletion from his own reserve account. Counsel, of course, sees this, for he says (brief, p. 18): "Recognizing this [the need of expedition], the law allows him to export 'free sugar' in the

stead of 'surplus' and then replace it by transfer from 'surplus' account."

I submit that counsel's concession on page 24 of his brief (see also pp. 29, 30) is conclusive against him, and that his corollary from the concession is not sound. He says:

> It is true that the exporter "receives a money reward or gratuity whenever he exports sugar from Russia." It is equally true, however, that he receives the same money reward or gratuity when he does *not* export his sugar, but sells it on the home market. In other words, the "money reward or gratuity," if it be a bounty at all, *is not conditioned on exportation, and hence not within the purview of section 5.*

Now, the producer does not receive a money reward or gratuity when he sells on the home market. He receives a *price* on his commodity; and none the less a *price* because its rate in that market which he prefers to seek is both stimulated and checked by the government scheme. Here is counsel's fallacy—the gratuity *quoad* exportation he must grant, and because fostering and controlling paternalism connects with exportation a regulation of local supply and demand, counsel forgets that at this point we enter the different field of *market price*, however fixed. He can not set off export *gratuity* against domestic *price*, as if the latter also were a gratuity.

And this leads to another point—our Government may connect the two elements. We are not, indeed, concerned to set them off against each other, but we

may add one to the other as proving the complaint. This case does not compel assent to Russia's general protective scheme because of abstract consistency with our own policy. *Non constat* that because Russia has a protective tariff we should bow to its incidents and consequences for the reason that we also believe in protection. Counsel makes the obvious point involved in this idea (e. g., pp. 35, 37) that we give indirect bounties through our tariff and by drawbacks or remission of internal duties on exportation, and in effect asks the question whether we would submit with equanimity to their interpretation or liability as bounties abroad. I have briefly noticed this point elsewhere. I do not think it tends altogether in the direction which counsel imagines. I think it is sound to say that if, beyond the effect of domestic protection and the legitimate stimulation of our trade to foreign countries, such devices operated deleteriously on foreign markets, we should have no very conclusive ground of objection if the sovereign controlling the particular foreign market should burden our access correspondingly. So Russia promptly did in this case—in the shape of specific retaliation, it is true, through advanced import duties there, rather than because of the bounty and countervailing principle applied to our export aids. But the weapon is the same in effect, and, indeed, Russia seized a larger sword than retaliation in exact kind offered. So I conceive that while law and amenities increasingly rule international relations, assertions of national interest must

still be heard on practical and essential demands, and imperatively seek the real nature of facts bearing on intercourse. We are not called upon to falter before academic consistency; we are dealing with the Russian sugar export plan as deleterious in our markets; we are not defending our very different drawback system. Consequently we are quite honestly able to urge that when Russia imposes excessive import duties and surtaxes on sugar, creating an exclusive domestic market and sustaining a high price therein, and really fostering production while professing to limit it, puts a premium on exportation so as to injure our own scheme of protection, we may scrutinize, detect, and weight the operation at this end, and thus maintain our self-protection.

We do not penalize as "bounties" the enhanced domestic prices due to artificial limitations of the home market by a protective tariff and its legitimate incidents, but when an extreme extension of the protective idea brings deleterious results to our home interests all the way from Russia, we do properly penalize the concrete expression of these results as an indirect bounty. And if some possible extension of our protection and export provisions so operated abroad, I imagine we should have no more satisfactory answer to offer than Russia has in this case.

Hartranft v. *Wiegmann*, an authority of great weight in its proper place, is invariably invoked by importers in all customs controversies. It is now brought forward, not in reference to the meaning of an ambig-

nous tariff schedule, but to sustain a foreign policy inimical to sound law, sound economic policy, and sound ethical views on the growing significance of joint international interest in international markets. I submit that *Hartranft* v. *Wiegmann* is not to be extended into this field with the same relevancy and effect as in a balance of doubt as between 40 and 50 per cent *ad valorem* duties under a tariff schedule. Rather the doctrine of reasonable interpretation stated in *Henderson* v. *The Mayor* (92 U. S., 259, 268), and quoted by the Board of General Appraisers, should be chosen as the guide.

CONCLUSION.

The Russian scheme has two aspects, as has been stated. They are somewhat antipathetic, one being to control and limit production from the home market point of view, and the other to stimulate production for export. To secure the latter purpose the Russian Government gives a benefit or advantage which is intricate in the way it works out through its internal excise system, but is none the less an inducement and favor which amounts to an indirect bounty, or by which a bounty or grant is indirectly bestowed. It may be that an indirect bounty could not be perceived where, however, a bounty was bestowed indirectly; that is, an indirect bounty (the substantive phrase) might possibly be regarded as importing a more definite and strict meaning than the verbal phrase. On the other hand, it seems impossible that any skill in dialectics could hope to argue that while the arrangement here may be

an indirect bounty. Russia does not, however, pay or bestow indirectly a bounty. The distinction is too shadowy to maintain, and, as I have sought to indicate, if any distinction could exist, it is in favor of the idea that a country might bestow a bounty indirectly when a definite "indirect bounty" was not, however, paid. But the language of the act in its explicit and comprehensive intention is too clear to allow of any such distinction.

In the dissenting opinion of General Appraiser Tichenor the idea is advanced that the lower price of sugar for export than for home consumption in the Russian markets furnishes no evidence that the Government pays or bestows a bounty or grant on exportation; because "all manufacturing countries export their surplus or overproduction at lower prices than the articles command in the home market." But we are considering an artificial creation of a quantity for export and not a casual or genuine surplus unaffected by government stimulation, which may be and is sold in foreign markets cheaper than at home. The lower price for exported sugar in Russia as compared with sugar for domestic consumption is very significant as part of the Russian Government's plan of carrying out its two objects of imposing limitations in the home market and seeking stimulation for the export trade. The operation is not, as the dissenting opinion seems to think, merely the omission to collect the internal tax, but it is, through the government scheme, the bestowal of a consequent right and grants a bonus which accrues upon the exportation of the sugar.

The case of *United States* v. *Passavant* (169 U. S., 16) shows that this court does not accept a foreign remission of internal tax as conclusive upon its effect with respect to our own laws, and therefore the court included in the proper appraised value of imported merchandise the "bonification" of tax or remission of their ordinary excise by the German Government on exported goods. This bonification or mere remission was regarded by the court as—

> A special advantage extended by government in aid of manufactures and trade, having the same effect as a bonus or drawback. To use one of the definitions of drawback, it is "a device resorted to for enabling a commodity affected by taxes to be exported and sold in the foreign market on the same terms as if it had not been taxed at all." But the laws of this country in the assessment of duties proceed upon the market value in the exporting country, and not upon that market value less such remission or amelioration as that country chooses to allow in accordance with its own views of public policy.

It seems pertinent to say that the principle which the court had in mind in that case, of not accepting as conclusive on us as to appraised value the foreign view of its trade and taxing systems, is applicable to the effect which the Russian arrangement should be allowed to exert upon our countervailing duty law.

The decision of the Board of General Appraisers and of the circuit court of appeals shows careful consideration by the tribunal specially qualified in customs

law and trained as experts in related technical questions, and the deliberate judgment of the court, which is ordinarily final in customs cases, approving and adopting the opinion of the Board of General Appraisers. As to the opinion of the circuit court, while it inclines to the view of the dissenting opinion of the Board of General Appraisers, it is proper to say that it is based on the real or supposed necessity of prompt if not hasty decision, and the certainty of appeal. For this reason the conclusion rather than the inconsistent inclination of that court is to be regarded as showing a great preponderance of authority in the tribunals below in favor of the contention of the United States. We submit with confidence that the Russian scheme carried out under their sugar law and regulations clearly amounts to the paying or bestowing indirectly of a bounty or grant upon the exportation of sugar, which properly subjects the merchandise, upon importation into this country, to the countervailing duty prescribed by section 5 of the act of 1897.

We therefore respectfully submit that the judgment of the court below should be affirmed.

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